

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



November 15, 2002

Agenda ID #1392

TO: PARTIES OF RECORD IN APPLICATION 99-01-003

Enclosed are the draft decision of Administrative Law Judge (ALJ) Ryerson and the alternate order of Commissioner Lynch. These items will not appear on the Commission's agenda for at least 30 days after the date they are mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision or the alternate order, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision and the alternate order as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and all Commissioners, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ CAROL A. BROWN by KKH
Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:hkr

Attachment

Decision **DRAFT DECISION OF ALJ RYERSON** (Mailed 11/15/2002)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Marine Services Express, Inc., a California Corporation, for a Certificate of Public Convenience and Necessity to Establish and Operate Scheduled Vessel Common Carrier Service between Designated Points and Places in the greater San Francisco Bay Area pursuant to and under contract(s) with Governmental or Private Entities on an Emergency, Interim or Continuous Basis

Application 99-01-003
(Filed January 5, 1999)

**FINAL OPINION GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY****I. Summary**

Marine Services Express, Inc. (Marine Services) is granted authority to establish and operate up to five scheduled vessel common carrier services on San Francisco Bay under financial sponsorship of public or private entities, subject to conditions set forth in our Order. Application (A.) 99-01-003 is closed.

II. Background and Procedural History

A full account of the procedural history of this amended application is included in Decision (D.) 01-05-020 (May 3, 2001). That interim decision in relevant part denied the parties' joint motion for adoption of a written settlement, but allowed the parties 60 days to renegotiate their settlement and propose it for adoption once again, or for Marine Services to revise its

application. The parties submitted a revised proposal suggesting various terms and conditions to be included in the Commission's order.

The Administrative Law Judge (ALJ) held a prehearing conference (PHC) on January 8, 2002, to allow the parties to clarify the new proposal. Marine Services and Blue & Gold Fleet, L.P. (Blue & Gold) attended through their respective counsel. The ALJ subsequently related in detail the terms of the proposal in his Ruling and Prehearing Conference Memorandum dated March 22, 2002. The parties concurred with the ALJ's rendition of the proposal after having an opportunity to correct the PHC memorandum. Accordingly, Marine Services' application was deemed revised so as to conform to the memorandum. Blue & Gold filed a withdrawal of its protest on April 19, 2002. As the amended application is unprotested, we now conclude this proceeding as an ex parte matter.

III. Proposed Terms for the Order

Marine Services' amended application requests "blanket" authority allowing the company to operate a number of publicly or privately sponsored vessel common carrier services on San Francisco Bay, subject only to registration of each service as and when the company enters into (or competes for the award of) a particular service contract.

The terms of this proposal are a response to adverse experiences of Marine Services and other vessel common carriers when they have previously sought Commission authority operate such services. Essentially, the underlying problem is that the timeline of our existing procedure, and the delays that have occurred in processing applications, have defeated the efforts of these carriers to bid for competitive contracts. A carrier generally either must have current valid operating authority or be able to secure it quickly in order to meet bidding and

contracting requirements. Even under the best of circumstances we have been unable to grant such authority in less than four months, and frequently it has taken us much longer. For all intents and purposes this has made it impossible for Marine Services to compete to operate new services such as the Alameda/Oakland Ferry as opportunities arise.

In order to address this situation, after considerable negotiation with Commission staff and with protestant Blue & Gold (a major Bay Area vessel common carrier) Marine Services has proposed the following terms and conditions for issuance of its certificate of public convenience and necessity (CPCN) in this proceeding:

1. Marine Services will have non-exclusive “blanket” authority to establish and operate as many as five scheduled vessel common carrier services on San Francisco Bay.
2. Marine Services’ authority to establish and operate these services will be effective for a period of two years from the effective date of the Commission’s order, but may be renewed or extended as provided below.
3. The establishment of each separate and particularly described service will be subject to the requirement that the service be registered in the manner prescribed below.
4. Each particular service to be established under this blanket authority must be publicly or privately sponsored, rather than instituted on Marine Services’ own initiative. This means that when the service is in operation Marine Services must be in contractual privity with the sponsoring public agency or party so that the cost of operation is underwritten by the sponsor at least in part, irrespective of the fact that passengers must pay individual fares for passage.

5. Any such service must not compete with any vessel common carrier service serving the same points on the same routes at the time it commences.

6. The blanket authority will expire two years after it becomes effective if it is not exercised, unless the Commission extends it upon application filed by Marine Services not less than 180 days before the expiration date and supported by a showing of the efforts Marine Services made to exercise that authority after it became effective, and of Marine Services' continued operational and financial fitness.
7. If Marine Services has exercised the blanket authority within the effective period, the Commission will renew that authority if, not less than 90 days before the expiration date, Marine Services serves notice of its intent to extend the authority. The notice must describe the extent to which the authority was exercised during the effective period, and include a showing that Marine Services remains operationally and financially fit to operate current and prospective services.
8. The Commission may increase the maximum number of services that may be operated under Marine Services' blanket authority upon application supported by a showing of the prospective need for the increased authority. Any such application must be filed sufficiently in advance of the anticipated exercise of the increased authority to enable the Commission to consider it under its usual procedure for deciding applications.
9. Any application filed under paragraphs 6 and 8 will be subject to the filing of protests under the Commission's usual procedure for deciding applications.
10. To register a particular service under paragraph 3, Marine Services must file a notice of intent to start the service not less than 60 days before its anticipated commencement. The notice must include the following information:
 - a. A description of the points and route to be served.
 - b. Whether the service will be established on an entirely new route, or whether it is an existing service for which

Marine Services expects (or is competing) to assume responsibility.

- c. A summary of the contractual terms and conditions under which it would operate the service, and a description of the methodology to be followed for entering into the contractual arrangement.
 - d. A summary of Marine Services' financial ability to operate the particular service involved.
 - e. A summary of Marine Services' operational fitness to operate the service, including a discussion of the availability of the necessary vessel(s) and a description thereof.
 - f. Identification of the agency or agencies other than the Commission which have conducted, or will conduct, environmental review of any aspect of establishment of the service under the California Environmental Quality Act (CEQA), and the nature, scope, and status of such review. If any such review is being conducted at the time its notice is filed Maritime Services will furnish pertinent documentation as part of its notice, and will include documentation of any final determination where such review has been concluded. If no other agency has conducted, or will conduct, such review, the registration notice must include information sufficient to enable the Commission to perform environmental review as the responsible agency under CEQA.
11. Registration of a particular service will not be deemed complete until the Executive Director issues a confirmation letter stating that all registration requirements have been satisfied.
12. A registered service may not commence operation until Marine Services has complied with General Orders 87, 111, and 117 with respect to that service and Marine Services has remitted the Transportation Reimbursement Fee required by Pub. Util. Code § 403, and until the Commission's Rail Safety and Carriers Division mails a notice to Marine Services that its evidence of insurance and other documentation required hereunder have

been filed with the Commission, and the U.S. Coast Guard has approved the use of the vessels involved.

13. The notice of registration of a particular service is not subject to protest, except that the operator of an existing vessel common carrier service may file a timely protest to a registration notice if the service to be registered would directly interfere with that existing service. If such a protest is filed, the registration notice will be treated as a formal application.
14. Termination of any registered service will be governed by the terms of the applicable contract, and will not require Commission authorization. Marine Services will notify the Commission immediately in the event of termination of registered service.
15. The rates and charges for any registered service may be established and adjusted under the terms of Marine Services' contract with the sponsor if the contract so provides, in which event the rates will be considered to be justified under Pub. Util. Code § 454 in recognition of the contractual commitment of the sponsor to underwrite some or all of the cost of operating the service.

IV. Discussion

Marine Services and its corporate parent and affiliates are well established vessel operators on San Francisco Bay and Lake Tahoe, with experienced, qualified personnel and the ability to rally assets to respond to the opportunity to undertake a new common carrier vessel operation. Although the character of its application in this proceeding has changed since it was originally filed, Marine Services at that time held itself out as ready, willing, and able to undertake the operation of the Oakland/Alameda Ferry service on reasonable advance notice. But for a change in the bidding process, it might well have done so.

The very nature of Marine Services' current request does not require the company to have at hand either substantial cash resources or a fleet of suitable

vessels. The types of services contemplated by the amended application involve financial underwriting by a third party, and usually the provision of a vessel by (or at the expense of) the sponsoring entity. Consequently, for the type of operating authority requested here the applicant's showing of financial and operational fitness need not be as strong as it is in a traditional request for operating authority.

The most important aspect of Marine Services' showing is that it is an established entity and going concern that will be able it to "step up to the plate" when a new opportunity arises. It already has the ability to acquire and staff vessels, put an administrative structure into place, and manage a new operation. Consequently, any adverse risk to the public interest of "pre-qualifying" Marine Services to operate as yet undefined service is very slight or nonexistent.

The public need for approval of preliminary operating authority for Marine Services and similar operators is becoming increasingly clear. As Marine Services states in its application, there is a growing awareness by state and local governmental agencies that,

Ferry service is and must be a viable alternative to the ever-increasing traffic congestion throughout the San Francisco Bay Area. The momentum for greater reliance on ferry alternatives was evidenced by the work of the Bay Area Water Transit Initiative Task Force ("BAWT"), as well as Senate Bill 428 which established the San Francisco Bay Area Water Transit Authority ("Authority") to implement greater high-speed water transit on San Francisco Bay. (Renewed Joint Motion for Adoption of Mutual Proposal for Amended Settlement; Proposal Attached, page 4.)

Such recent developments are indicative of a public policy that increasingly favors the establishment of new ferry services on San Francisco Bay. The only way we can assist in carrying out this public policy is to adopt a more innovative

and flexible approach to licensing of new services. To put it bluntly, we must be part of the solution to this transportation crisis so that we do not become part of its cause.

The streamlined procedure set forth in Marine Services' proposal is a rational solution to the need for a responsive licensing procedure when the company has new business opportunities. We will continue to evaluate on a case-by-case basis Marine Services' financial and operational ability to operate a particular service, as well as the foreseeable environmental consequences of that service. The authority granted under this procedure is nonexclusive, limited in duration, and complementary to (rather than duplicative of) authority for existing services. Safeguards are included to ensure appropriate environmental review under the California Environmental Quality Act (CEQA). Finally, compliance with Commission General Orders 87, 111, and 117, payment of mandatory fees to the Commission, and documentation of liability insurance coverage and U.S. Coast Guard certification are handled in the same manner as for other vessel common carrier licensing matters.

Our decision to approve Marine Services' amended application today is sound public policy, and will serve as a model for other experienced vessel common carriers that may want to develop new ferry services on San Francisco Bay or compete for the operation of existing ones. We believe it serves the public interest by setting the stage for greater use of this natural resource to develop environmentally friendly regional transportation services. We will grant Marine Services' amended request.

V. Categorization

In Resolution ALJ 176-3008, dated January 20, 1999, the Commission preliminarily categorized this application as ratesetting, and preliminarily

determined that hearings were not necessary. The only protest has been withdrawn. Therefore, we affirm the preliminary determinations.

VI. Assignment of Proceeding

Loretta Lynch is the Assigned Commissioner and Victor Ryerson is the assigned ALJ in this proceeding.

VII. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____.

Findings of Fact

1. Currently the Commission's procedural timeline for processing a vessel common carrier's application for a CPCN to operate a scheduled vessel service is such that an order generally cannot be issued less than 120 days from the date of filing. Frequently, a period of more than six months is required to process such an application, particularly if it is protested.

2. Through its corporate parent and affiliates Marine Services has significant experience operating passenger vessels on San Francisco Bay, is a going concern, and has the experience and resources to initiate, operate, administer, and manage new or existing vessel common carrier services on San Francisco Bay.

3. Marine Services and other established San Francisco Bay vessel operators have sought to operate vessel common carrier services on San Francisco Bay under public or private sponsorship. The cost of operation of such services is underwritten in whole or in part by the sponsoring entity, irrespective of the fact that passengers must pay individual fares for passage.

4. The Commission's current timeline for considering applications for authority to initiate a vessel common carrier service has caused Marine Services to be unable to satisfy bidding or contracting requirements of sponsoring entities in a timely manner, including the sponsor of the Oakland/Alameda Ferry.

5. On at least two occasions, other vessel common carrier operators have begun operating common carrier vessel services, including the Oakland/Alameda Ferry, without proper Commission operating authority, because they were contractually obligated to do so before the Commission could issue an order granting authority.

6. A sponsor's bidding and contracting requirements may preclude a prospective operator from competing for a sponsored service, because the sponsor requires the prospective operator to have Commission operating authority to operate the service in question.

7. The terms and conditions of our order currently proposed by Marine Services would enable it to respond in a timely manner to opportunities to operate scheduled common carrier vessel services under third-party sponsorship. Commission authority would become effective as little as 60 days before commencement of the service.

8. The terms and conditions currently proposed by Marine Services for our order pose little or no adverse risk to the public interest.

9. There is a public need for the establishment of new common carrier vessel services on San Francisco Bay, the precise points and routes of which have not yet been identified by potential sponsoring entities. Legislative and administrative actions are making the establishment of new service possible. It is highly probable that sponsoring agencies will seek to establish such services in the foreseeable future.

10. The terms and conditions proposed by Marine Services for our order include provision for environmental review of any proposed service by the responsible agency.

11. The terms and conditions proposed by Marine Services for our order would require Marine Services to comply with Commission General Orders 87, 11, and 117, pay mandatory fees to the Commission, and provide documentation of liability insurance coverage and U.S. Coast Guard certification on the same basis as other vessel common carrier licensing matters.

Conclusions of Law

1. Approval of Marine Services' amended application in accordance with the proposed terms and conditions is in the public interest.

2. Marine Services is financially fit to carry out the terms and satisfy the conditions of the order.

3. Marine Services is operationally fit to carry out the terms and satisfy the conditions of the order.

4. The Commission should approve Marine Services' amended application with the proposed terms and conditions.

FINAL ORDER

IT IS ORDERED that:

1. The application of Marine Services Express, Inc. (Applicant) for a certificate of public convenience and necessity to establish and operate scheduled vessel common carrier service between designated points and places in the greater San Francisco Bay Area pursuant to and under contracts with governmental or private entities is granted on the terms, and subject to the conditions, included in this order.

2. Applicant shall have non-exclusive authority to establish and operate as many as five scheduled vessel common carrier services on San Francisco Bay.

3. Applicant's authority to establish and operate these services will be effective for a period of two years from the effective date of this order, but may be renewed or extended as provided below.

4. The establishment of each separate and particularly described service is subject to the requirement that the service be registered in the manner prescribed below.

5. Each particular service to be established under this blanket authority must be publicly or privately sponsored, rather than instituted on Applicant's own initiative. This means that when the service is in operation Applicant must be in contractual privity with the sponsoring public agency or other party so that the cost of operation is underwritten by the sponsor at least in part, irrespective of the fact that passengers must pay individual fares for passage.

6. Any service established hereunder may not compete with any vessel common carrier service serving the same points on the same routes at the time the new service commences.

7. The authority granted herein, if not exercised, will expire two years after the effective date of our order, unless the Commission extends it upon application filed by Applicant not less than 180 days before the expiration date and supported by a showing of Applicant's efforts to exercise that authority after the effective date, and of Applicant's continued operational and financial fitness.

8. If Applicant exercises this authority within the effective period, the Commission will renew that authority if, not less than 90 days before the expiration date, Applicant serves notice of its intent to extend the authority. The notice must describe the extent to which Applicant exercised the authority

during the effective period, and include a showing that Applicant remains operationally and financially fit to operate current and prospective services.

9. The Commission may increase the maximum number of services that may be operated under Applicant's blanket authority upon application supported by a showing of the prospective need for the increased authority. Any such application must be filed sufficiently in advance of the anticipated exercise of the increased authority to enable the Commission to consider it under its usual procedure for deciding applications.

10. Any application filed under Paragraphs 7 and 9 will be subject to the filing of protests under the Commission's usual procedure for deciding applications.

11. To register a particular service under Paragraph 4, Applicant must file a notice of intent to start the service not less than 60 days before its anticipated commencement. The notice must include the following information:

- a. A description of the points and route to be served.
- b. Whether the service will be established on an entirely new route, or whether it is an existing service for which Applicant expects (or is competing) to assume responsibility.
- c. A summary of the contractual terms and conditions under which it would operate the service, and a description of the methodology to be followed for entering into the contractual arrangement.
- d. A summary of Applicant's financial ability to operate the particular service involved.
- e. A summary of Applicant's fitness to operate the service, including a discussion of the availability of the necessary vessel(s) and a description thereof.

- f. Identification of the agency or agencies other than the Commission which have conducted, or will conduct, environmental review of any aspect of establishment of the service under the California Environmental Quality Act (CEQA), and the nature, scope, and status of such review. If any such review is being conducted at the time its notice is filed Applicant will furnish pertinent documentation as part of its notice, and will include documentation of any final determination where such review has been concluded. If no other agency has conducted, or will conduct, such review, the registration notice must include information sufficient to enable the Commission to perform environmental review as the responsible agency under CEQA.

12. Each registration shall be separately captioned, and shall be docketed by the Commission as though it is a new application proceeding, but shall be closed when registration is complete. The Commission shall publish each registration in its Daily Calendar. Registration of a particular service will not be deemed complete until the Executive Director issues a confirmation letter stating that all registration requirements have been satisfied.

13. Operation of a registered service may not commence until Applicant has complied with General Orders 87, 111, and 117 with respect to that service, has remitted the Transportation Reimbursement Fee required by Pub. Util. Code § 403, and the Commission's Rail Safety and Carriers Division has mailed a notice to Applicant that its evidence of insurance and other required documentation have been filed with the Commission, and the U.S. Coast Guard has approved the use of the vessels involved.

14. Notice of registration of a particular service is not subject to protest, except that the operator of an existing vessel common carrier service may file a timely protest to a registration notice if the service to be registered would directly

interfere with that existing service. If such a protest is filed, the registration notice will be treated as a formal application.

15. Termination of any registered service will be governed by the terms of the applicable contract, and will not require Commission authorization. Applicant will notify the Commission immediately in the event of termination of registered service.

16. The rates and charges for any registered service may be established and adjusted under the terms of Applicant's contract with the sponsor if the contract so provides, in which event the rates will be considered to be justified under Pub. Util. Code § 454 in recognition of the contractual commitment of the sponsor to underwrite some or all of the cost of operating the service.

17. Application 99-01-003 is closed.

This order is effective today.

Dated _____, at San Francisco, California.